IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 87 of 1985

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE A.R.DAVE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

LALLUDAS CHILDREN TRUST

Versus

COMMISSIONER OF INCOME-TAX

Appearance:
MR RD PATHAK for Petitioner
MR B.B.NAIK WITH MR MANISH R BHATT for Respondent No. 1

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE A.R.DAVE

Date of decision: 12/09/2000

ORAL JUDGEMENT

Per C.J.:-

In the case of the assessee which claims status of a valid trust in the name of Shri Lalludas Children Trust, for the assessment year 1978-79, the following question of law has been referred under section 256 (1) of the Income tax Act, 1961 :

"Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in confirming the order of the Commissioner (appeals) holding that no appeal was maintainable under section 246 (1) (c) of the Income tax Act, 1961 against the assessment order made on protective basis"?

For answering the above question posed, a few facts need be stated as under:

The assessing officer for the assessment year 1978-79 passed an order of assessment under section 143 (3) of the Act describing the same to be "protective assessment" holding that the assessee is not a valid trust as it is found to be against rule of perpetuity. The income claimed by the assessee as a trust was distributed amongst the beneficiaries.

Aggrieved by the assessment order, the trust went up in appeal to the Commissioner of Income tax (appeals). The appellate authority vide order dated 17.11.1983 held that the appeal at the instance of the trust is not maintainable under section 246 (1) (c) of the Act (as was the provision at the relevant time). The reasoning of the Tribunal is that as on the basis of order of protective assessment, the assessing officer has not held the trust to be liable for payment of any tax, the trust cannot be said to be an aggrieved assessee.

The assessee then carried the matter to the Income tax Appellate Tribunal. The tribunal also confirmed the order of the Appellate Authority and held that the appeal was not maintainable.

It is on the above facts that the question quoted above has been referred to us.

Learned counsel Mr. Pathak appearing for the assessee brings to our notice the earlier order, dated 27.4.1983 of the Income tax Appellate Tribunal in the case of the same assessee for the assessment years 1976-77 and 1977-78 by which the status of the assessee as a valid trust has been recognised and the income returned by it

has been treated to be its income. It is surprising that overlooking the order of the appellate tribunal passed in the case of the same assessee for the assessment years 1976-77 and 1977-78, the tribunal in the present case,for the assessment year 1978-79 of the same assessee, has held the assessee to be not a valid trust and denied it right of appeal on the ground that no tax was levied on it. It is interesting to note that for the earlier assessment years 1976-77 and 1977-78, on the question of status of the assessee and its claim that it was a valid trust, the appeal was entertained and ultimately the assessee had succeeded before the tribunal.

We find no merit in the contention advanced on behalf of the revenue that since no tax liability has been created against the present assessee, the question posed is academic and the authorities were right in holding that no appeal lay against an order passed by the assessing officer in the course of protective assessment.

The appeal provision contained in section 246 which was applicable at the relevant time in the assessment year 1978-79 was as under :

"246. (1) Subject to the provisions of sub section (2), any assessee aggrieved by any of the following orders of an Income tax Officer may appeal to the Appellate Assistant Commissioner against such order-

(a) x x
(b) x x
(c) an order against the assessee, where the assessee denies his liability to be assessed under this Act or any order of assessment under sub-section (3) of section 143 or section 144, where the assessee objects to the amount of income assessed, or to the amount of tax determined, or to the amount of loss computed, or to the status under which he is assessed.

(d) x x
(e) x x
(f) x x
(g) x x
(h) x x
(i) x x
(j) x x
(k) x x
(l) x x

(m) x x
(n) x x
(o) x x.

Explanation" "Status" means the category under which the assessee is assessed as "individual" "Hindu undivided family" and so on.

The provisions of the Act do not contemplate passing of any protective assessment and,therefore, no appeal is provided against such order of assessment. But where the assessing officer by such order described by him as protective assessment, determines the status of the assessee and which has adverse effect of imposing tax on its beneficiaries or on the creator of the trust, the order certainly is against the claim of the assessee for its status to be a valid trust. Such order is appealable under the above quoted provisions contained in section 246 (1) (c) read with the Explanation thereunder which defines the word "status".

In our considered opinion, therefore, the Commissioner (appeals) and the Appellate Tribunal were wrong in holding that the so called protective assessment order, in which status of the assessee as valid trust was not recognised, was not appealable. We are also of the view that the Appellate Tribunal committed a grave error may be through inadvertence in not noticing the fact that in the previous assessment years 1976-77 and 1977-78 of the same assessee, appeals were entertained and the Appellate Tribunal had passed order dated 27.4.1983 recognising the status of the assessee to be a valid trust.

On behalf of the assessee, learned counsel Mr. Pathak relies on the decision of this court in Taraben Ramanbhai Patel vs. ITO, 215 ITR 323. It fully supports the submissions made on behalf of the assessee. The decision of the Tribunal in the case of the assessee for the assessment year in question, is contradictory to its own decision dated 27.4.1983 in the assessment case of the same assessee for assessment years 1976-77 and 1977-78. In the case of Taraben (supra), following observations made are pertinent:

"Prima facie, we find considerable substance in the argument of Mr. Pathak that since two groups of appeals came up for hearing before two different Appellate Assistant Commissioners, different and almost contradictory orders came to

> be passed. Had all the appeals been placed before one officer,probably similar orders would have been passed by showing similar treatment and extending similar benefits to all persons similarly situated. It is no doubt true that the strict rule of the doctrine of res judicata does not apply to proceedings under the Income tax Act. At the same time, it is equally true that unless there is a change of circumstances, the authorities will not depart from previous decisions at their sweet will in the absence of material circumstances or reasons for such departure."

In the result,for the reasons aforesaid, the Reference is answered in the negative, i.e. in favour of the assessee and against the revenue. The Reference is accordingly disposed of. In the circumstances, however, we make no order as to costs.

(D. M.Dharmadhikari, C.J.)

(A. R. Dave,J.)

parekh